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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB03

February 25, 2021

VIA EMAIL

Brooke Schultz
Reporter, Delaware State News
bschultz@newszap.com

RE: FOIA Petition Regarding the Sussex Technical School District Board of Education

Dear Ms. Schultz:

We write in response to your correspondence alleging that the Board of Education of the Sussex Technical School District (“District”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA’s open meeting requirements has occurred or is about to occur. As set forth below, we conclude that the Sussex Technical School District Board of Education (“Board”) violated FOIA by not giving adequate notice on its agenda of its intent to vote on the superintendent’s appointment, and we recommend that the Board remediate this violation by conducting a vote in open session at a future meeting with proper notice of its intended action.

BACKGROUND

In the summer of 2020, the Sussex Technical School District Board of Education appointed Dr. Kevin Carson as acting superintendent for the District. The Board then scheduled a public meeting on November 9, 2020, noticing an executive session on its agenda for “Personnel” reasons and an open session item entitled “Personnel Action Items.”¹ At the meeting, the Board first entered executive session to discuss several personnel and hiring matters,² including the acting

¹ Petition.

² The Board is reminded that 29 *Del. C.* § 10004(b)(9) permits private discussions of personnel matters in which the names, competencies, and abilities of employees will be discussed; Section 10004(b)(1) permits the discussion of the qualifications of an individual to hold a job,

superintendent, and later voted in open session on “personnel agenda A and agenda B as presented.”³ One item on the personnel agendas was the “Appointment of Dr. Kevin Carson as Superintendent.”⁴ Both personnel agendas were approved unanimously in open session without discussion.⁵

This Petition followed, alleging the Board gave insufficient notice to the public of its intention to appoint a superintendent at this meeting. Pointing to this Office’s decision in Attorney General Opinion No. 20-IB29, the Petition argues that the Board must be more specific in its description in its agenda when appointing a superintendent; here, you assert the Board’s agenda only used broad generalities that did not alert the public to the appointment of the superintendent.

The Board’s attorney filed a response on the Board’s behalf on February 5, 2021 (“Response”). The Board asserts it complied with FOIA by giving adequate notice on its agenda, but even if a violation took place, the Board argues the lack of notice caused no harm because no discussion of the appointment of the superintendent occurred at the meeting prior to the vote that the public could observe. The Board asserts that it is not required to name the employee on the executive session agenda when an employee will be discussed, nor does the agenda require any more specificity than its reference to “Personnel.”

The Board also argues that its open session item of “Personnel Action Items” is sufficient; the fact that another school district’s board of education in Attorney General Opinion No. 20-IB29 more specifically announced its intention to select a superintendent in its agenda does not mean that this level of specificity is the minimum requirement under FOIA. In fact, the Board alleges that this level of specificity is “neither required nor customary.”⁶ Noting that a cursory review of all districts revealed the districts use “personnel” or “personnel matters” in its agenda for action on a “personnel agenda” or “consent agenda,” the Board contends that although he is the leader of the district, the acting superintendent does not forfeit his privacy rights. The Board argues that the requirements for agenda descriptions for hiring a superintendent are the same as other staff under the law, and Attorney General Opinion No. 15-IB01 is an outlier opinion. The Board further contends that “[h]ad the Superintendent’s contract not been renewed, the public would have learned of his non-renewal at the same time he did,” meaning that he would not be afforded “any privacy or a chance to be informed of such traumatic information before its publicity, and would be completely contrary to how public business transacts in Delaware.”⁷

which encompasses discussions of the qualifications of new hires. It is recommended that future agendas reflect the proper exemption.

³ Petition.

⁴ *Id.*

⁵ Response.

⁶ *Id.*

⁷ *Id.*

DISCUSSION

This Petition alleges that the Board's agenda as a whole gave insufficient notice to the public about the Board's planned appointment of its superintendent. The Board carries the burden of proof to demonstrate its compliance with FOIA.⁸ FOIA requires an agenda to include a "general statement of the major issues expected to be discussed at a public meeting" including notice of an executive session and the specific grounds for the executive session.⁹ The agenda must alert members of the public with an "intense interest" in the matter that the subject will be taken up at the meeting.¹⁰ "In other words, members of the public interested in an issue should be able to review a notice and determine that an issue important to them will be under consideration."¹¹

The Petition first alleges that the executive session agenda is insufficient because the term "Personnel" did not provide adequate notice of the Board's executive session discussions regarding the superintendent position.¹² FOIA permits an executive session for the purpose of "personnel matters in which the names, competency and abilities of individual employees or

⁸ 29 *Del. C.* § 10005(c).

⁹ 29 *Del. C.* § 10002(a).

¹⁰ *Lechliter v. Del. Dep't of Natural Res. and Env'tl. Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017).

¹¹ *Id.*

¹² The propriety of the discussion in this executive session is a separate matter. *O'Neill v. Town of Middletown*, 2007 WL 2752981, at *8 (Del. Ch. Mar. 29, 2007) ("A determination that a public body sufficiently noticed its intent to hold an executive session under FOIA does not confirm that the executive session itself was a proper one. The inquiries are separate."). As this claim was not raised in the Petition to afford the Board an opportunity to respond, this opinion does not address this separate inquiry, but we note for the Board's attention the recent opinions addressing the discussion of a superintendent's contract in executive session in certain circumstances. *See, e.g., Del. Op. Att'y Gen.* 15-IB10, 2015 WL8772946, at *2 (Dec. 1, 2015) ("School boards should be able to discuss the competencies and abilities of all of their employees, including superintendents, in executive session, and may do so within FOIA as long as those discussions are severed from express discussions regarding renewal of a superintendent's [employment] contract."); *Del. Op. Att'y Gen.* 15-IB01, 2015 WL 3919060, at *4 (Jun. 12, 2015) ("Thus, we find that under the circumstances of this case, the Board violated FOIA when it discussed the renewal of the Contract in executive session."); *Del. Op. Att'y Gen.* 13-IB01, 2013 WL 2477025, at *19-20 (Mar. 26, 2013) (stating this Office is disinclined to follow previous decisions allowing employment contract discussions in executive session under the "strategy exemption" in Section 10004(b)(4)); *but see, e.g., Del. Op. Att'y Gen.* 06-IB15, 2006 WL 2355969, at *3 (July 24, 2006) (finding that the Board could discuss superintendent's salary in executive session when an open session discussion would jeopardize its competitive position by disclosing the salary it was willing to pay prior to opening salary negotiations).

students are discussed, unless the employee or student requests that such a meeting be open.”¹³ The requirements for noticing executive session items are less stringent than open session items because the session is closed to the public.¹⁴ FOIA merely requires that an agenda state the purpose for the executive session.¹⁵ The Board’s agenda is not required to name the personnel to be discussed.¹⁶ In this case, the executive session agenda’s reference to “Personnel” is sufficient to alert the public to a discussion of the acting superintendent’s competencies and abilities in the executive session in connection with his appointment to the superintendent position.¹⁷

The Petition next alleges that the agenda’s reference to “Personnel Action Items” is insufficient to alert the public to the Board’s intended vote on the appointment of the Superintendent. We agree. This agenda’s broad descriptors of “Personnel” and “Personnel Action Items,” are not sufficient to alert any citizen with an intense interest in the matter of the renewal of the superintendent’s contract that it would be addressed at the meeting. In a factually similar opinion, this Office decided an agenda noticing an executive session for “Legal and Personnel Issues” accompanied by a statement that the board “planned to take action with respect to each of the items discussed in executive session during the public meeting” was insufficient notice to the public for a vote on the renewal of the superintendent’s contract.¹⁸ This opinion correctly notes that a citizen would have no way of knowing the superintendent’s contract would be considered at this meeting in order to decide whether to attend the meeting. Thus, we determine that this defect in the November 9, 2020 meeting agenda constitutes a violation of FOIA.

Having found a FOIA violation has occurred, we must consider what remediation is appropriate. In response to a violation of the open meeting requirements, we may recommend

¹³ 29 *Del. C.* § 10004(b)(9).

¹⁴ *Del. Op. Att’y Gen.* 06-IB15, 2006 WL 2355969, at *2.

¹⁵ *Common Cause of Del. v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 1995 WL 733401, at *4 (Del. Ch. Dec. 5, 1995) (“[T]he Act simply requires public bodies to disclose the purpose of executive sessions in the agenda”).

¹⁶ *Del. Op. Att’y Gen.* 03-IB20, 2003 WL 22669565, at *1 (Sept. 3, 2003); *Del. Op. Att’y Gen.* 99-IB05, 1999 WL 1093454, at *1 (May 12, 1999).

¹⁷ *See, e.g., O’Neill*, 2007 WL 2752981, at *7 (determining “Legal & Personnel Issues” to be adequate descriptors on the executive session agendas); *Del. Op. Att’y Gen.* 12-IIB13, 2012 WL 6858971, at *4 (Dec. 21, 2012) (determining that noticing executive sessions for the purpose of discussing “Personnel Matters” was adequate); *Del. Op. Att’y Gen.* 10-IB03, 2010 WL 1048826, at *2 (Mar. 10, 2010) (determining that “Executive Session to Discuss Contract and Personnel Issues” is adequate notice); *Del. Op. Att’y Gen.* 96-IB27, 1996 WL 517437, at *2 (Aug. 1, 1996) (deciding that notice for “personnel matters in which names, competency, and ability of individual employees may be discussed” was sufficient under FOIA).

¹⁸ *Del. Op. Att’y Gen.* 15-IB01, 2015 WL 3919060, at *4-5.

remediation when a public body has taken action on a matter affecting substantial public rights.¹⁹ We have previously determined that open meeting violations resulting in the selection of a superintendent outside of public view affects the substantial public rights of students, parents, teachers, and other concerned citizens.²⁰ However, the authority to invalidate a vote or impose other injunctive relief is reserved for the courts.²¹ Our Office has previously declined to recommend remediation when such a recommendation would cause significant disruption, and the public had additional opportunities to observe the superintendent selection process.²² We can discern no other opportunity in this record for the public to observe the appointment of the superintendent, and he was in an acting position for months prior to his appointment. Unlike previous precedent, a re-vote in these circumstances will not cause significant disruption to the District. Accordingly, we find that the Board's November 9, 2020 agenda violated FOIA and, at a minimum, recommend that the Board revisit the matter and conduct a vote regarding the appointment of the superintendent in open session at a future meeting with proper notice to the public.

Violations of FOIA's open meeting requirements expose a board to judicial action, including the invalidation of the board's actions on matters of public business, the award of attorneys' fees and costs, and other remedies.²³ We strongly recommend that the State's boards of education adhere to the principles of FOIA, especially when handling important matters, such as the selection of its superintendents.

¹⁹ *Del. Op. Att'y Gen.* 05-IB15, 2005 WL 2334344, at *4 (Jun. 20, 2005) (citing *Ianni v. Dep't of Elections of New Castle Cnty.*, 1986 WL 9610, at *6 (Del. Ch. Aug. 29, 1986)).

²⁰ *Del. Op. Att'y Gen.* 02-IB17, 2002 WL 31031224, at *8 (Aug. 6, 2002) (determining that violations associated with selecting the superintendent affected substantial public rights, but declining to support invalidation of the hiring of the superintendent due to the public access that occurred later in the process and the potential disruption to the students and staff so close to the beginning of a new school year).

²¹ Pursuant to 29 *Del. C.* § 10005(e), this Office is charged with determining “whether a [FOIA] violation . . . has occurred or is about to occur.” 29 *Del. C.* § 10005. Although remediation may be recommended when appropriate, this Office is not vested with the authority to impose injunctive relief or punitive measures for FOIA violations. *Id.* (citing remedies that a court may impose); *Del. Op. Att'y Gen.* 17-IB15, 2017 WL 3426253, at *7 (July 7, 2017) (“[T]his Office does not have the statutory authority to invalidate the . . . Board’s actions.”); *Del. Op. Att'y Gen.* 16-IB23, 2016 WL 7010495, at *2 (Oct. 28, 2016) (“[T]his Office is not vested with the authority to impose punitive measures for FOIA violations. You are free to seek redress in the courts if you believe that additional relief is warranted.”) (citation omitted).

²² *Del. Op. Att'y Gen.* 02-IB17, 2002 WL 31031224, at *8 (Aug. 6, 2002).

²³ 29 *Del. C.* § 10005.

CONCLUSION

For the reasons set forth above, we conclude that the Board violated FOIA's open meeting requirements by failing to properly notice the open session item of the superintendent's appointment on its agenda and recommend that the Board remediate this violation by conducting a vote in open session at a future meeting with proper notice of its intended action.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: James H. McMackin, III, Attorney for the District